DN FST CV 15 6048103-S

DONNA L. SOTO, ADMINISTRATRIX	)	SUPERIOR COURT
OF THE ESTATE OF VICTORIA L.	)	
SOTO, DECEASED, ET AL.	)	J.D. OF FAIRFIELD/BRIDGEPORT
	)	@ BRIDGEPORT
v.	)	
	)	
BUSHMASTER FIREARMS	)	
INTERNATIONAL, LLC, ET AL.	)	December 11, 2015

THE REMINGTON DEFENDANTS'
MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION
TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs' case against the Remington Defendants should be dismissed in its entirety under the immunity afforded to firearm manufacturers by the Protection of Lawful Commerce in Arms Act. 15 U.S.C. § 7901 *et seq*. ("PLCAA"). Contrary to federal law, Plaintiffs seek to hold the Remington Defendants responsible for the tragic shooting at Sandy Hook Elementary School under various legal theories, including (1) negligent entrustment, (2) products liability, and (3) violation of the Connecticut Unfair Trade Practices Act ("CUTPA"). (*See, e.g.*, Pls.' First Amended Complaint ("FAC") at Count One, ¶¶ 213-227.) None of these claims survive application of the plain language of the PLCAA.

The PLCAA was enacted to protect firearm manufacturers from civil actions for damages and other relief resulting from the criminal or unlawful use of firearms by third parties. 15 U.S.C. § 7901(b)(1). By providing immunity for such actions, Congress focused specifically on litigation that had "been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by third parties, including criminals." 15 U.S.C. § 7901(a)(3). Congress found these lawsuits to be "an abuse of the legal system" and enacted the PLCAA to ensure that those who manufacture firearms are not held "liable for the harm caused by those who criminally or unlawfully misuse them." 15 U.S.C. §§ 7901(a)(5) & (6). This lawsuit falls squarely within the immunity protection that the PLCAA affords to firearm manufacturers. Thus, the Remington Defendants should be dismissed because the Court lacks jurisdiction over the subject matter of this case. 15 U.S.C. § 7902.

In addition to the explicit protections of the PLCAA, the Court also does not have subject matter jurisdiction of Plaintiffs' CUTPA claim because they lack standing to assert a CUTPA

violation. Plaintiffs are not consumers of the Remington Defendants' products and are not competitors, or other business persons with a consumer or commercial relationship to the Remington Defendants. Further, plaintiffs have not suffered the type of financial injury that CUTPA was enacted to redress. But the Court need not reach the question of standing because the protections provided by the PLCAA alone require dismissal.

MOTION TO DISMISS STANDARD

"[A] motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." *Goodyear v. Discala*, 269 Conn. 507, 511, 849 A.2d 791 (2004) (internal quotation marks omitted). "A motion to dismiss shall be used to assert lack of jurisdiction over the subject matter, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." *Kizis v. Morse Diesel International, Inc*., 260 Conn. 46, 51, 794 A.2d 498 (2002) (internal quotation marks omitted). "The plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." *Fink v. Golenbock*, 238 Conn. 183, 199 n. 13, 68 A. 2d 1243 (1996).

"Subject matter jurisdiction [implicates] the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. *Fort Trumbull Conservancy, LLC v. City of New London*, 265 Conn. 423, 429-30, 829 A.2d 801 (2003) ("A determination regarding a trial court's subject matter jurisdiction is a question of law.") (internal quotation marks omitted). "It is axiomatic that if the court lacks subject matter jurisdiction, it is without power to hear the matter before it. Therefore, the court must determine the jurisdictional issue before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction." *Pinchbeck v. Department of Public Health*, 65 Conn. App. 201, 208, 782 A.2d 242 (2001) (internal quotation

marks omitted).

"The doctrine of [statutory] immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." *Martin v. Brady*, 261 Conn. 372, 376, 802 A.2d 814 (2002) (citing *Antinerella v. Rioux*, 229 Conn. 479, 489, 642 A.2d 699 (1994)); *accord Gilliand v. Sportsmen's Outpost, Inc*., 2011 Conn. Super. LEXIS 2309, *16-19 (Conn. Super. Sept. 15, 2011) ("Where the PLCAA bars the action, dismissal is appropriate."); *Cayo v. O'Garro*, 2014 Conn. Super. LEXIS 1999, *10 (Conn. Super. Ct. Aug. 11, 2014) ("[T]he immunity defenses advanced by the defendants are intended to be "immunity from suit rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial.") (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 44 (D.D.C. 2013) (PLCAA immunity is a threshold issue under Federal Rule of Civil Procedure 12)). A plaintiff's lack of standing is also the proper subject of a motion to dismiss. *Goodyear*, 269 Conn. 507 at 511 ("Standing is the legal right to set the judicial machinery in motion … and implicates the court's subject matter jurisdiction.") (internal citations omitted). Hence, no further actions should be taken by the Court until it is determined that it has subject matter jurisdiction over this case.

BACKGROUND

Plaintiffs' case against the Remington Defendants is premised on their allegations that one of the firearms criminally misused by Adam Lanza – a Bushmaster XM-15 semi-automatic rifle – should not have been marketed and sold for civilian use in Connecticut because it allegedly posed an unreasonable risk of injury. The rifle had been lawfully purchased in 2010 by Adam Lanza's mother Nancy, who like any adult resident of Connecticut who passed the required law enforcement background check and was not otherwise legally disqualified from owning or

possessing the rifle, could purchase, own and use the firearm for lawful purposes. *See* 18 U.S.C. §922(t)(1); 27 C.F.R. §478.102. There are no allegations that the manufacture of the rifle by the Remington Defendants violated any of the then existing federal, state or local firearm laws, regulations and ordinances. *See, e.g.*, Conn. Gen Stat. § 53-202a(a)(3) (1993) (defining prohibited "assault weapons" as those having at least two specified features, *e.g.*, telescoping stock, pistol grip, flash suppressor). Plaintiffs nevertheless seek to turn the entirely lawful actions of the rifle's manufacturer into actionable wrongs justifying injunctive relief and recovery of compensatory and punitive damages for wrongful death and personal injury.

A. The rifle was lawfully marketed, sold and possessed in Connecticut in 2010 and is lawful to possess in Connecticut today.

The Bushmaster rifle and other similar AR-type semiautomatic rifles with similar design features have been purchased and owned for decades by "[m]illions of Americans" for lawful civilian purposes. *Shew v. Malloy*, 994 F.Supp.2d 234, 245 (D.Conn. 2014), *aff'd in part, rev'd in part*, 2015 U.S. App. LEXIS 18121 (2d Cir. Oct. 19, 2015) ("[T]here can be little dispute that tens of thousands of Americans own these guns and use them exclusively for lawful purposes such as hunting, target shooting and even self-defense."); *Heller v. District of Columbia*, 670 F.3d 1244, 1260 (D.C. Cir. 2010) ("We think it clear enough . . . that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use' as the plaintiffs contend."). Semiautomatic rifles like the XM-15 "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994).[1]

[1] "AR" stands for Armalite, the company that first manufactured this type of semi-automatic rifle. Generally, an AR-type firearm is a semi-automatic rifle that has a detachable magazine, has a grip protruding roughly four inches below the action of the rifle, and is easily accessorized. *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 364 (W.D.N.Y. 2013). A semi-automatic firearm fires only one shot with each pull of the trigger, in contrast to an automatic firearm, which fires repeatedly with a single trigger pull. *Heller v. District of Columbia*, 670 F.3d 1244, 1285-86

In 2013, the Connecticut General Assembly passed "An Act Concerning Gun Violence Prevention and Children's Safety" in response to the shooting at Sandy Hook Elementary School. Conn. Gen. Stat. §53-202a (2013) (the "Act"). The Act expanded an earlier statutory definition of prohibited "assault weapons" to include specific semiautomatic rifles listed by make and model as well as and other rifles with a single prohibited design feature. *Compare* Conn. Gen. Stat. § 53-202a (2013) (prohibiting rifles by specific make and model and others with two or more prohibited design features); *with* Conn. Gen. Stat. § 53-202a (1993). The Act also prohibited the sale and purchase of ammunition magazines capable of holding more than ten rounds. Conn. Gen. Stat. § 53-202w ("large capacity magazines").

The Bushmaster rifle was among the firearms newly defined by the General Assembly as an "assault weapon" in 2013. Conn. Gen Stat. § 53-202a(1)(B); *see also Shew*, 994 F.Supp.2d at 238-41. However, the General Assembly did not ban possession of the rifle and other firearms it classified as "assault weapons" or "large capacity magazines" altogether. Persons may lawfully possess the firearms today in Connecticut, provided they were lawfully owned as of April 4, 2013 and they are registered with the state. Conn. Gen. Stat. § 53-202d(a)(2)(A). And the firearms may be lawfully manufactured in Connecticut for sale outside the state. Conn. Gen. Stat. § 53-202i (circumstances in which manufacture of "assault weapons" not prohibited). "Large capacity magazines" may still be possessed in Connecticut if they were possessed prior to January 1, 2014 and a certificate of possession is obtained. Conn. Gen. Stat. § 53-202x.

Against this legislative back-drop, Plaintiffs contend the Bushmaster rifle had negligible utility for hunting, sporting and self-defense use, posed unreasonable risks of physical injury and

(D.C.Cir. 2011) (Kavanaugh J., dissenting). The vast majority of new handguns today are semi-automatic. *Id*.

should not have been marketed and sold in 2010 for civilian use in Connecticut. (FAC at ¶¶ 12, 166.) Through this case, Plaintiffs, in essence, seek to substitute their view on what types of firearms law-abiding persons should be permitted to own in Connecticut for the policy choices made by the General Assembly.

B. Public policy regarding the manufacture, marketing, sale and ownership of firearms has been established by the legislative branches of government and should not be undone by courts or juries.

The General Assembly's actions in 2013 underscore that policy decisions regarding what types of firearms are lawfully manufactured, marketed and sold for civilian use are appropriately made by legislatures, not by courts or juries on a case-by-case basis. *See New York State Rifle & Pistol Ass'n v. Cuomo,* 2015 U.S. App. LEXIS 18121 *40 (2d Cir. Oct. 19, 2015) ("We remain mindful that ' [i]n the context of firearms regulation, the legislature is far better equipped than the judiciary to make sensitive policy judgments . . . concerning the dangers of carrying firearms and the manner to combat those risks.'") (internal citation omitted); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1121 (Ill. 2004) ("[T]here are strong public policy reasons to defer to the legislature in the matter of regulating the manufacture, distribution, and sale of firearms."); *Penelas v. Arms Tech., Inc*., 778 So. 2d 1042, 1045 (Fla. App. 2001) ("[T]he judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government, but to the legislative branch."); *People v. Sturm, Ruger*, 761 N.Y. 2d 192, 203 (N.Y. App. 2003) ("As for those societal problems associated with, or following, legal handgun manufacturing and marketing, their resolution is best left to the legislative and executive branches."); *In re Firearms Cases,* 126 Cal. App. 4th 959, 985 (Cal. App. 2005) ("While plaintiffs' attempt to add another layer of oversight to a highly regulated industry may represent a desirable goal . . . [e]stablishing public policy is primarily a legislative function

and not a judicial function, especially in an area that is subject to heavy regulation."); *Hamilton v. Beretta*, 96 N.Y. 2d 222, 239-40 (N.Y. 2001) ("[W]e should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales remains the focus of a national policy debate.").

The role legislatures have in regulating firearms is reflected in one of the stated purposes of the PLCAA: "[t]o preserve and protect the Separation of Powers doctrine" found in the United States Constitution. 15 U.S.C. § 7901(b)(6). The separation of powers doctrine is also firmly embedded in Connecticut law and has its source in the Connecticut Constitution. CONN. CONST., Article II; *see University of Connecticut Chapter AAUP v. Governor*, 200 Conn. 386, 394, 512 A.2d 152 (1986) ("In the establishment of three distinct departments of government the Constitution, by necessary implication, prescribes those limitations and imposes those duties which are essential to the independence of each and to the performance by each of the powers of which it is made the depository."); *Kelley Property Dev., Inc. v. Lebanon*, 226 Conn. 314, 339-340, 627 A.2d 909 (1993) (separation of powers requires judicial deference to legislative resolution of conflicting considerations of public policy).

Congress deemed the PLCAA necessary because "liability actions" were seen as "attempt[s] to use the judicial branch to circumvent the legislative branch of government." 15 U.S.C. § 7901(a)(8). Plaintiffs seek to do exactly that in this case: circumvent the policy choice made by the General Assembly that the firearm purchased by Nancy Lanza in 2010 was lawful to manufacture, market, sell and possess in Connecticut. The criminal use to which the firearm was put was indeed tragic. However, as a matter of sound judicial policy, the decision made by the General Assembly cannot be undone by a court without significantly interfering with the powers that reside within the legislative branch of government.

ARGUMENT

A. The PLCAA requires immediate dismissal of the Plaintiffs' claims.

1. Operation and application of the PLCAA.

The PLCAA was enacted to protect firearm manufacturers against the very claims Plaintiffs make in this case. The declared purpose of Congress was to "prohibit causes of action against manufacturers, distributors, dealers and importers of firearms" for harm "caused by the criminal or unlawful use of firearms" that "functioned as designed and intended." 15 U.S.C. § 7901(b)(1); *see City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 402 (2d Cir. 2008) ("We think Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the 'lawful design, manufacture, marketing, distribution, importation or sale of firearms.'"). Congress viewed actions by state and municipal governments, private interest groups and individual plaintiffs seeking to hold firearm manufacturers liable for the criminal misuse of firearms that "functioned as designed and intended" as improper attempts to regulate an already "heavily regulated" industry "through judgments and judicial decrees." 15 U.S.C. §§ 7901(a) (3), (4), (8). Congress, therefore, prohibited such claims from being "brought in any Federal or State court." 15 U.S.C. § 7902(a).

Under the plain and unambiguous terms of the PLCAA, a case that meets the definition of a "qualified civil liability action" is subject to immediate dismissal. Congress defined a "qualified civil liability action" as follows:

> The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.

15 U.S.C. § 7903(5)(A). A "qualified product" includes "firearms as defined in subparagraph (A)

or (B) of section 921(a)(3) of title 18." 15 U.S.C. § 7903(4). Section 921(a)(3), in turn, defines a "firearm" to include "any weapon … which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3).

The PLCAA also defines those entitled to its protections—"manufacturers" and "sellers." A "manufacturer" is defined as "a person who is engaged in the business of manufacturing the [qualified] product in interstate commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18." 15 U.S.C. § 7903(2). A "seller" is defined as (1) an "importer (as defined in section 921(a)(9) of title 18)," (2) "a dealer (as defined in section 921(a)(11) of title 18)," or (3) "a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(a) of title 18)." 15 U.S.C. § 7903(6). Under the PLCAA, a "seller" of a "qualified product" does not include firearm manufacturers.[2]

With these definitions in place, Congress created broad immunity for firearm manufacturers in "qualified civil liability actions," subject to certain limited exceptions. 15 U.S.C. §§ 7903(5)(A)(i)-(vi). A state law action that fits within an exception is not prohibited under the PLCAA. The enumerated exceptions material to Plaintiffs' claims are:

> (ii) an action brought against a seller for negligent entrustment or negligence per se;
>
> (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including --
>
> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make an appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted or conspired with any person in making any false entry or fictitious oral or

[2] A dealer as defined in section 921(a)(11) includes "any person engaged in the business of selling firearms at wholesale or retail." 18 U.S.C. § 921(a)(11).

> written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any person to sell or otherwise dispose of a qualified product, knowing or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm under subsection (g) or (n) of section 922 of title 18;
>
> * * *
>
> (v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that when the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.

15 U.S.C. §§ 7903(5)(A)(ii), (iii), (v).

Notably, Congress made clear that the exceptions to PLCAA immunity do not "create a public or private cause of action or remedy." 15 U.S.C. § 7903(5)(C). Thus, relevant state law must be examined to determine whether a plaintiff has an action that fits within a narrowly defined exception to immunity.[3]

[3] Every federal and state appellate court to have addressed the constitutionality of the PLCAA has found it constitutional. *See City of New York*, 524 F.3d 384, 392-98 (2d Cir. 2008), *cert denied*, 129 S. Ct. 3320 (2009); *Ileto v. Glock*, 565 F.3d 1126, 1138-42 (9th Cir. 2009), *cert denied*, 130 S. Ct. 3320 (2010); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 172-82 (D.C. 2008), *cert denied*, 129 S. Ct. 1579 (2009); *Estate of Kim ex rel v. Coxe*, 295 P.3d 380, 388-92 (Alaska 2013); *Adames v. Sheehan*, 909 N.E.2d 742, 764-65 (Ill. 2009), *cert denied*, 130 S. Ct. 1014 (2009). In addition, at least three trial courts have issued opinions affirming the PLCAA's constitutionality. *See Estate of Charlot v. Bushmaster Firearms, Inc*., 628 F. Supp. 2d 174, 182-86 (D.D.C. 2009); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1222 (D. Colo. 2015); *Gilland v. Sportsmen's Outpost, Inc.*, 2011 Conn. Super. LEXIS 1320, *43-60 (Conn. Super. Ct. May 26, 2011). And numerous courts have applied the PLCAA to dismiss lawsuits without confronting challenges to its constitutionality. *See, e.g.*, *Al-Salihi v. Gander Mountain, Inc.*, 2013 U.S. Dist. LEXIS 134685 (N.D.N.Y. Sept. 20, 2013); *Jeffries v. District of Columbia*, 916 F. Supp. 2d 42 (D.D.C. 2013); *Bannerman v. Mountain State Pawn, Inc*., 2010 U.S. Dist. LEXIS 145292 (N.D.W.Va. Nov. 5, 2011); *Ryan v. Hughes-Ortiz*, 81 Mass.App.Ct. 90 (Mass. App. 2012).

2. This case meets the definition of a "qualified civil liability action" against a manufacturer of a "qualified product".

This case meets the prefatory definition of a "qualified civil liability action." It is a "civil action … against a manufacturer … for damages … resulting from the criminal or unlawful misuse" of a firearm by a "third party." 15 U.S.C. § 7903(5)(A). Plaintiffs allege Adam Lanza's actions were criminal, and it is clear that their damages resulted from his criminal misuse of a firearm. (FAC at ¶¶ 204-206.) The question is then whether any of the claims pleaded against the Remington Defendants fits within any of the enumerated exceptions to manufacturer immunity. They do not.

3. The PLCAA prohibits a negligent entrustment action against a firearm manufacturer.

Plaintiffs allege that the Remington Defendants manufactured and negligently entrusted the firearm used by Adam Lanza to Camfour, a wholesale distributor of sporting goods located in Massachusetts. (FAC at ¶¶ 176, 224-225.) However, Congress limited the availability of a state law action for negligent entrustment of a firearm to actions against a "seller." *See* 15 U.S.C. §§ 7903(5)(A)(ii). Thus, state law negligent entrustment actions against firearm manufacturers are prohibited under the PLCAA.

As the plain language of the PLCAA makes clear, the Remington Defendants are not "sellers." 15 U.S.C. § 7903(2). Indeed, Plaintiffs specifically allege that Riverview Sales and Camfour are "qualified product sellers within the meaning of 15 U.S.C. § 7903(6)" (FAC at ¶ 30, 36), but do not make that allegation as to the Remington Defendants. Plaintiffs cannot bring a negligent entrustment action against the Remington Defendants, and to the extent Plaintiffs have attempted to do so, the action should be dismissed as a "qualified civil liability action" under the PLCAA.

4. The PLCAA prohibits a product liability action against a firearm manufacturer where the discharge of the firearm was the result of a volitional criminal act.

The Connecticut Product Liability Act ("CPLA") provides the exclusive remedy for all "claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product." Conn. Gen. Stat. § 52-572m. Although Plaintiffs have denied doing so, they have pleaded a product liability claim against the Remington Defendants. They allege the Remington Defendants wrongfully marketed and sold the rifle to the civilian market with knowledge that it posed an unreasonable risk of physical injury to others. (*See, e.g.*, FAC at Count One, ¶ 213.) Plaintiffs further allege that the utility of the rifle for lawful use was outweighed by the risk of its unlawful use. (*Id*. at Count One, ¶ 217.) And Plaintiffs allege that the Remington Defendants' conduct in marketing the firearm for civilian use was a "substantial factor resulting in" their damages. (*Id.* at Count One, ¶ 227.) Under Connecticut law, these are product liability allegations.

Although an exception to PLCAA immunity exists for a product liability action against a firearms manufacturer, such an action is not available "where the discharge of the [firearm] was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). Under such circumstances, the volitional criminal act is "considered the sole proximate cause of the resulting death, personal injuries or property damage." *Id*.

Here, Plaintiffs have clearly alleged Adam Lanza intentionally discharged the firearm. (*See* FAC at ¶¶ 201-07.) His actions were undeniably criminal. *See Adames v. Sheahan*, 909 N.E.2d 742, 761-62 (Ill. 2009) (holding that a criminal conviction is not required to find that the volitional discharge of a firearm prohibits a product liability action under the PLCAA). In

accordance with the plain terms of the PLCAA exception regarding product liability suits, Adam Lanza's criminal actions were the sole proximate cause of the deaths and injuries he inflicted. Plaintiffs' claims that the Remington Defendants' design, marketing and sale of the firearm used by Adam Lanza caused their damages are plainly prohibited by the PLCAA.[4]

5. Plaintiffs have not pleaded a knowing violation of a statute "applicable to the sale or marketing" of firearms.

An action in which a firearm manufacturer "knowingly violated of a State or Federal statute applicable to the sale or marketing" of a qualified product and "the violation was a proximate cause of the harm for which relief is sought" is an exception to PLCAA immunity. 15 U.S.C. § 7903(5)(A)(iii). However, Plaintiffs have not alleged that the Remington Defendants violated a statute applicable to the sale or marketing of firearms. As explained by the Second Circuit in *City of New York*, this exception encompasses only those statutes that "expressly regulate firearms" or "that clearly can be said to implicate the purchase and sale of firearms." *City of New York*, 524 F.3d at 403 (holding that the New York criminal nuisance statute was not "applicable to the sale

[4] The Remington Defendants would have a defense to these types of claims even in the absence of the immunity provided by the PLCAA. Before the PLCAA was enacted, courts routinely dismissed cases against firearm manufacturers for damages resulting from the criminal discharge of firearms that *functioned as they were designed and intended to function*. *See Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989) (dismissing claim alleging that "Saturday Night Special" was useful for criminal purposes and manufacturer's marketing of firearm was an abnormally dangerous activity); *Linton v. Smith & Wesson*, 469 N.E.2d 339 (Ill. App. 1984) (finding no duty on the part of manufacturer of non-defective firearm to control distribution to the general public); *Riordan v. International Armament Corp*., 477 N.E.2d 1293 (Ill. App. 1985) (dismissing claim alleging that manufacturer of concealable, inexpensive handgun was strictly liable because the gun "served no useful social purpose"); *Perkins v. F.I.E. Corp*., 762 F.2d 1250 (5th Cir. 1985) (holding that manufacture of small caliber handguns is not an ultra-hazardous activity); *Mavilia v. Stoeger Industries*, 574 F.Supp. 107 (D. Mass. 1983) (dismissing claim against manufacturer based on negligent marketing and distribution of an alleged inherently defective product); *Patterson v. Gesellschaft*, 608 F.Supp. 1206 (N.D. Tex. 1985) (dismissing claim alleging that handguns pose risks of injury and death that outweigh social utility); *Martin v. Harrington & Richardson, Inc*., 743 F.2d 1200 (7th Cir. 1984) (dismissing claim alleging that sale of handguns is an ultra-hazardous activity); *Armijo v. Ex Cam, Inc*., 843 F.2d 406 (10th Cir. 1988) (same).

or marketing of firearms"); *Ileto*, 565 F.3d at 1135-36 (finding it "likely that Congress had in mind only ... statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry – rather than general tort theories that happened to have been codified by a given jurisdiction").

The existence of myriad laws relating to the manufacture, marketing, sale and ownership of firearms was recognized by Congress. In enacting the PLCAA, Congress expressly found that "[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws." 15 U.S.C. § 7901(a)(4). Indeed, at the federal level, statutes and regulations touch on virtually all aspects of firearms manufacture, ownership and use. *See, e.g*., 18 U.S.C. § 921 *et seq*. (Gun Control Act of 1968) and regulations promulgated thereunder, 27 CFR Part 478 (Commerce in Firearms and Ammunition); 26 U.S.C. § 5801 *et seq*. (National Firearms Act) and regulations promulgated thereunder, 27 CFR Part 479 (Machine Guns, Destructive Devices and Certain Other Firearms); and 28 CFR Part 25 (National Instant Criminal Background Check System). However, federal law does not occupy the field to the exclusion of state and local laws. 18 U.S.C. § 927 (Federal firearms laws do not "operate[] to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict ... so that the two cannot be reconciled or consistently stand together.").

Most states, including Connecticut, also regulate the manufacture, sale and ownership of firearms. *See, e.g.*, Conn. Gen. Stat. § 29-28 *et seq*. (permit for sale at retail of pistol or revolver); Conn. Gen. Stat. § 29-33 (sale, delivery or transfer of pistols and revolvers); Conn. Gen. Stat. § 29-37a (sale or delivery at retail of firearm other than pistol or revolver); Conn. Gen. Stat. § 29-37b (retail dealer to equip firearms with locking device at time of sale and warn of consequence of unlawful storage); Conn. Gen. Stat. § 53-202a (permitted rifle, shotgun and pistol designs);

Conn. Gen. Stat. § 53-202b (sale or transfer of assault weapons); Conn. Gen. Stat. § 53-202c (possession of assault weapons); Conn. Gen. Stat. § 53-202d (certification of possession of assault weapons); Conn. Gen. Stat. § 53-202f (transportation of assault weapons). Some states, including Massachusetts, Maryland and California, dictate firearm designs by statute, specifying the mechanical safety features of firearms. *See* Cal. Pen. Code § 12126; Mass. Gen. L. § 131K; Md. Code § 5-132.

Firearm laws applicable to the sale and marketing of firearms are also found at the local level. In Connecticut, Bridgeport, Hartford and New Haven are among the municipalities with laws addressing firearms sales and ownership. Bridgeport Municipal Code, Title 9, Ch. 9.16; Municipal Code of Hartford, Ch. 21, Art. II; New Haven Code of Ordinances. Ch. 18; *see also ATF State Laws and Published Ordinances*, available at www.aft.gov/file/58536/download (last visited Dec. 9, 2015). Although many of these laws do not expressly reference the "sale or marketing" of firearms, most can be said to "implicate" the sale or marketing of firearms by, for example, dictating what types of firearms may be lawfully possessed and who may lawfully possess them. *See Gilland v. Sportsmen's Outpost, Inc.*, 2011 Conn. Super. LEXIS 1320, *20 (Conn. Super. Ct. May 26, 2011) (illustrating the type of statutes, both federal and state, that Congress intended to serve as predicate statutes under Section 7903(5)(A)(iii), including 18 U.S.C. § 922(b)(2) (sales prohibited to certain persons), and Conn. Gen. Stat. §§ 29-31 (pertaining to display of permits to sell and record sales of pistols and revolvers), 29-33 (pertaining to the sale, delivery, or transfer of pistols and revolvers), 29-361 (pertaining to verification of eligibility of persons to receive or possess firearms, the State database, the instant criminal background check and related issues)).

Congressional intent is plainly reflected in the examples of predicate statutes set forth in

Section 7903(5)(A)(iii). The examples include statutes dictating the records to be kept by sellers with respect to firearm sales and statutes prohibiting seller complicity in illegal firearm sales. 15 U.S.C. §§ 7903(5)(B)(iii)(I) & (II). In its analysis of whether the New York nuisance statute was the type of statute Congress intended to serve as a predicate statute, the Second Circuit in *City of New York* looked to these examples and applied two canons of statutory construction: *noscitur a sociis* (meaning of one term may be determined by reference to terms it is associated with) and *ejusdem generis* (general words should be limited to things similar to those specifically enumerated). *City of New York*, 524 F.3d at 401. The court held that a nuisance statute could not serve as a predicate statute under the PLCAA because it was not similar or related to the enumerated examples. Indeed, the court in *Ileto* reasoned that "there would be no need to list examples at all" if "*any* statute that 'could be applied' to the sales and manufacturing of firearms qualified as a predicate statute." *Ileto*, 565 F.3d at 1134 (emphasis in original).[5]

The same analysis compels one conclusion in this case: that Congress did not intend for state unfair trade practice statutes, such as CUTPA, to serve as predicate statutes under Section 7903(5)(B)(iii). Indeed, "it is well-settled that the decisions of the Second Circuit Court of Appeals carry particularly persuasive weight in the interpretation of federal statutes by Connecticut state courts." *Rodriquez v. Testa*, 296 Conn. 1, 11, 993 A.2d 955 (2010).

i. Congress did not intend for a statute of general application to serve as a predicate statute under section 7903(5)(A)(iii).

[5] The example provided in Section 7903(5)(B)(iii)(II) specifically refers to aiding and abetting violations of Sections 922(g) and (n) of the Gun Control Act, which identify the categories of persons who are prohibited from purchasing firearms. The example provided in Section 7903(5)(B)(iii)(I) sets forth language found in Sections 922(m) of the Gun Control Act, which makes it unlawful for sellers to knowingly fail to maintain required record of firearm sales or make false entries in those records.

CUTPA is the only statute referenced in Plaintiffs' Complaint (FAC at Count One, ¶ 226). It does not expressly regulate or clearly implicate the regulation of firearms. *See* Conn. Gen. Stat. § 42-110g. CUTPA is a statute of general application that creates an action to recover an "ascertainable amount of money or property" resulting from unfair or deceptive business practices. The CUTPA liability scheme is "expansive." *Associated Inv. Co. Ltd. Partnership v. Williams Assoc. IV,* 230 Conn. 148, 156, 645 A.2d 505 (1984). CUTPA embraces a much broader range of business conduct than common law tort actions. *Sportsmen's Boating Corp., v. Hensely*, 192 Conn. 148, 156, 645 A.2d 505 (1994). CUTPA is a broad, remedial statute and is not the type of statute "Congress had in mind" when carving out a narrow statutory violation exception to the broad immunity afforded by the PLCAA. *Ileto,* 565 F.3d at 1135-36. And because it is a fundamental rule of statutory construction that statutory exceptions are to be narrowly construed to preserve the primary purpose of the statute, CUTPA cannot be reconciled with congressional intent to protect firearm manufacturers from litigation. *Commissioner v. Clark*, 489 U.S. 726, 739 (1989).

Much like CUTPA, the nuisance statute at issue in *City of New York* is also a statute of general application. It prohibits conduct that endangers the public and is alleged to be "unreasonable under all the circumstances." N.Y. Penal Law § 240.45. The Second Circuit, relying on the overall purpose of the PLCAA, well-established canons of statutory construction, and legislative history, held that the New York nuisance statute did not "fall within the predicate exception to the claim restricting provisions of the PLCAA." *City of New York*, 524 F.3d at 399. The court's reasoning was straightforward: the New York nuisance statute was not the type of statute Congress intended to serve as a predicate statute because it neither "expressly regulat[ed]" nor could "clearly . . . be said to implicate" the sale or marketing of firearms. 524 F.3d at 403. The court expressly rejected an interpretation of "applicable to" to mean "capable of being applied"

because it was a "too-broad reading of the predicate exception." *Id*. at 402. Such an interpretation would be an "absurdity" because it "would allow the predicate exception to swallow the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets." *Id*. at 401-02.[6]

The analysis of whether CUTPA can serve as a predicate statute under Section 7903(5)(A)(iii) should be consistent with the analysis performed by the Second Circuit in *City of New York*. Both statutes are statutes of general applicability capable of being applied to a broad spectrum of impermissible commercial conduct. CUTPA broadly focuses on "unfair or deceptive" conduct causing commercial harm. Conn. Gen. Stat. § 42-110b(a). The New York nuisance statute is equally broad, prohibiting "conduct . . . unreasonable under all the circumstances." N.Y. Penal Law § 240.45(1). Neither statute expressly references the sale or marketing of firearms. And although the court in *City of New York* stated in *dicta* that a predicate statute need not necessarily "expressly refer to the firearms industry," 524 F.3d at 400, it specifically held that "construing the term 'applicable to' to mean statutes that clearly can be said to regulate the firearms industry more accurately reflects the intent of Congress." *Id*. at 401. The court had little difficulty finding that Section 7903(5)(A)(iii) did "not encompass" the New York nuisance statute. *Id*. at 403.

In reaching the same conclusion, the Ninth Circuit in *Ileto*, 565 F.3d at 1136-37, like the Second Circuit in *City of New York*, was "mindful of the limited persuasive values of remarks" by individual legislators. *See City of New York*, 524 F.3d at 402. The court in *Ileto* nevertheless found

[6] The dictionary definition of "implicate" is "to be involve[d] in the nature or operation of something." WEBSTER'S NEW COLLEGIATE DICTIONARY, 605 (1987). It is difficult to envision a statute being "applicable to the sale or marketing of firearms" without some aspect of firearms-related activity being inherent in the statute's purpose or basic to its operation.

"the unanimously expressed understanding" of legislators that "sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations" was in "complete harmony" with the purpose and text of the PLCAA. *Ileto*, 565 F.3d at 1137. The court stated:

> We make two general observations from our review of the extensive legislative history of the PLCAA. First, all of the congressional speakers' statements concerning the scope of the PLCAA reflected the understanding that manufacturers and sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations. *See, e.g.*, 151 Cong. Rec. S9087-01 (statement of Sen. Craig) ("This bill does not shield [those who] . . . have violated existing law . . . and I am referring to the Federal firearms laws."); *id.* S9217-02 (statement of Sen. Hutchison) ("[Lawsuits] would also be allowed where there is a knowing violation of a firearms law."); *id.* (statement of Sen. Craig reading a *Wall Street Journal* article) ("The gun makers . . . would continue to face civil suits for defective products or for violating sales regulations."); *id.* (statement of Sen. Reed in opposition to the PLCAA) ("We will let [plaintiffs] proceed with their suit if there is a criminal violation or a statutory violation, a violation of regulations, but for the vast number of other responsibilities we owe to each other, that are defined for the civil law, one will not have the opportunity to go to court."); *id.* S8927-01 (statement of Sen. Reed) (stating that the PLCAA would not apply to violations of "statutes related to the sale or manufacturing of a gun"); *id.* S9246-02 (statement of Sen. Santorum) ("This bill provides carefully tailored protections that continue to allow legitimate suits based on knowing violations of Federal or State law related to gun sales.").

Id. at 1136-37; *see also City of New York*, 524 F.3d at 402-03 ("[W]e think that the [congressmen's] statements nevertheless support the view that the predicate exception was meant to apply only to statutes that actually regulate the firearms industry, in light of the statements' consistency amongst each other and with the general language of the statute itself."); *see State v. Courchesne*, 296 Conn. 622, 669, 998 A.2d 1 (2010) (holding that when a statute is not plain and unambiguous, the legislative history, the circumstances surrounding the statute's enactment, and the legislative policy the statute was designed to implement is examined).

The argument that a statute *capable of being applied* to the sale or marketing of firearms is sufficient to bring a cause of action within the predicate exception has been rejected by all courts that have addressed the issue. *See City of New York*, 524 F.3d at 402 (finding this "a far too broad reading of the predicate exception"); *accord Ileto*, 565 F.3d at 1126 ("Indeed, if any statute that 'could be applied' to the sales and manufacturing firearms qualified as a predicate statute, there would be no need to list examples at all."). There is simply no way to shoehorn an expansive CUTPA action into the narrow Section 7903(5)(A)(iii) exception without ignoring precedent and congressional intent. *See, e.g., District of Columbia v. Beretta U.S.A. Corp*., 940 A.2d 163, 171 (D.C.App. 2008) ("Shoehorning, as it were, into the predicate exception [the D.C. Assault Weapons Manufacturing Strict Liability Act] that, at bottom, simply shifts the cost of injuries resulting from the discharge of lawfully manufactured and distributed firearms would, in our view, 'frustrate Congress's clear intention.'").[7]

In *City of New York*, the plaintiff broadly complained about the sales and marketing practices of the defendant handgun manufacturers, claiming that their practices helped create a criminal marketplace for firearms. In *dicta*, the court in *City of New York* "declin[ed] to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general

[7] In *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. App. 2007), an Indiana appellate court found that the Indiana nuisance statute was "applicable" to the sale or marketing of firearms and could serve as a predicate statute under § 7903(5)(A)(iii), but did so for reasons not present here. The court's ruling was based on a pre-PLCAA decision in the case by the Indiana Supreme Court, which held that defendants' alleged violations of Indiana statutes "specifically applicable to the sale or marketing of firearms" gave rise to a statutory public nuisance claim. *Id*. at 430-32 ("Thus, even assuming that the PLCAA requires an underlying violation of a statute directly applicable to the sale or marketing of a firearm, the City has alleged such violations in their complaint."). In contrast, Plaintiffs here have not alleged that the Remington Defendants violated any laws directly applicable to the sale or marketing of firearms. Moreover, the court in *City of Gary* relied on an interpretation of "applicable" by the district court in *City of New York* to mean "capable of being applied" (*id*. at 431), which has since been overruled and rejected by the Second Circuit as "a far too-broad reading of the predicate exception." *City of New York*, 524 F.3d at 384.

applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." *Id*. at 399. The court's *dicta*, however, should be viewed in light of the court's holding, in which it "foreclose[d] the possibility" that the New York state nuisance statute could serve as a predicate statute under Section 7903(5)(A)(iii). The court did not provide any further guidance as to what other type of "statute of general applicability" might qualify as a predicate statute, what "circumstances" might exist to conclude that Congress intended for such a statute to serve as a predicate, or whether the "specific conduct that the City complain[ed] of" led to the court's *dicta*. Without more, the court's *dicta* is just that—a statement that is not binding in subsequent cases. *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999) (dictum not binding in future cases).

ii. Recognition of CUTPA as a predicate statute applicable to the sale or marketing of firearms will render other enumerated exceptions to immunity superfluous.

Permitting an expansive CUTPA claim to go forward under the predicate exception would eviscerate congressional intent to provide immunity to firearm manufacturers from claims arising from the criminal misuse of firearms. It would also render the other exceptions to immunity unnecessary, including the breach of contract or warranty, negligent entrustment and negligence *per se* exceptions. *See* 15 U.S.C §§ 7903(5)(A)(ii), (iv). "Statutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." *Housatonic R.R. Co. v. Comm'r of Revenue Servs*., 301 Conn. 268, 303, 21 A.2d 759 (2011) (citing *Semerzakis v. Comm'r of Soc. Servs*., 274 Conn. 1, 18, 873 A.2d 911 (2005) (Courts are to presume "the legislature did not intend to enact meaningless provisions.")). In order to avoid PLCAA immunity, a person harmed by a criminal use of a firearm would have no reason to plead and take on a burden of proving anything more than a firearm manufacturer acted "unfairly" under CUTPA. Firearm

manufacturers will find themselves immersed in litigation based on allegations that their lawful manufacture and sale of firearms was nevertheless morally or ethically wrong and caused harm. The PLCAA was enacted to provide firearm manufacturers immunity for this very type of claim. There is no credible basis to argue otherwise.

CUTPA is not the type of statute Congress intended to serve as a predicate statute under Section 7903(5)(A)(iii) for an additional reason. Under CUTPA, a plaintiff need not prove defendant's actual or constructive knowledge that its actions were wrongful and caused harm. *See Normand Josef Enters. v. Connecticut Nat'l Bank*, 230 Conn. 486, 523, 646 A.2d 1289 (1994) ("a party need not prove an intent to deceive to prevail under CUTPA"). In contrast, under Section 7903(5)(A)(iii), there must be proof that the predicate statute was "knowingly violated" by the defendant. Recognition of CUTPA and its expansive business/consumer remedial scheme as a predicate statute under Section 7903(5)(A)(iii) would directly undermine congressional intent to provide broad immunity to firearm manufacturers who have not "knowingly violated" a statute applicable to the sale or marketing of firearms.

B. Plaintiffs lack standing to maintain a CUTPA claim.

Even without the immunity provided by the PLCAA, Plaintiffs cannot maintain a CUTPA claim against the Remington Defendants because Plaintiffs lack standing. The legislature did not intend for CUTPA to provide protection for persons who do not have a commercial relationship with the alleged wrongdoer and who have not suffered a "financial" injury. While a plaintiff need not allege a "consumer relationship" with a defendant in order to assert a CUTPA claim, *see Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 498 (1995), the Connecticut Supreme Court has rejected the proposition that "a CUTPA plaintiff is not required to allege *any* business relationship with the defendant." *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 157 (2005) (emphasis

added); *see also Pinette v. McLaughlin*, 96 Conn. App. 769, 778 (2006) ("Although our Supreme Court repeatedly has stated that CUTPA does not impose the requirement of a consumer relationship, the court also has indicated that a plaintiff must have at least *some* business relationship with the defendant in order to state a cause of action under CUTPA.") (internal citation omitted).

Connecticut courts have recognized only three categories of persons who have suffered financial injury to have standing under CUTPA: (1) consumers, (2) competitors, and (3) other business persons with a consumer or commercial nexus to the alleged wrongdoer. *Provost-Daar v. Merz N. Am., Inc.*, No. CV136037872S, 2014 Conn. Super. LEXIS 411, *7-8 (Conn. Super. Ct. Feb. 24, 2014); *Caltabiano v. L&L Real Estate Holdings II, LLC*, No. CV074019729S, 2009 Conn. Super. LEXIS 817, *19-20 (Conn. Super. Ct. Mar. 20, 2009), *aff'd sub nom., Caltabiano v. L & L Real Estate Holdings II, LLC*, 128 Conn. App. 84, 15 A.3d 1163 (2011). Plaintiffs do not fall into any of the categories. They were not "consumers" of the Remington Defendant's products, nor were they business competitors or in any type of commercial relationship with the Remington Defendants. Put simply, Plaintiffs do not allege (nor could they) any type of relationship with the Remington Defendants that would give them CUTPA standing.

Moreover, Plaintiffs do not seek the sort of relief CUTPA affords. CUTPA may be used to recover damages for financial injury, but not damages flowing from personal injury or wrongful death. *Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 129-30 (2003); *cf. Haynes v. Yale-New Haven Hospital*, 243 Conn. 17, 34 (1997) (although "entrepreneurial and commercial" aspects of medical profession are covered by CUTPA, medical negligence claims for personal injury damages are not covered). Plaintiffs' claims against the Remington Defendants concerning the "unreasonable risks" posed by the rifle, the alleged limited utility of the rifle for lawful uses and

the manner in which the rifle was marketed, are based on allegations about personal injuries and wrongful death, and they should be dismissed. *See Vacco v. Microsoft Corp.*, 260 Conn. 59, 88 (2002) ("[W]e previously have stated that 'it strains credulity to conclude that CUTPA is so formless as to provide redress to any person, for any ascertainable harm, caused by any person in the conduct of any trade or commerce.'").

CONCLUSION

For the above-stated reasons, the Remington Defendants respectfully request that Counts 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, and 31 of Plaintiffs' First Amended Complaint be dismissed.

Dated: December 11, 2015.

THE DEFENDANTS,

REMINGTON ARMS CO., LLC and
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BY:/s/ Scott M. Harrington/#307196

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I hereby certify that a true copy of the foregoing was mailed on December 11, 2015 to the following counsel:

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